IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL CASUALTY COMPANY, a corporation,
Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,
Plaintiff and Appellee,

A. C. GOERIG and CLYDE PHILP, individuals and co-partners,
Defendants and Cross Appellants,

SAM MACRI, DON MACRI and JOE MACRI, individuals and co-partners,
Defendants and Cross Appellants.

No. 11707

BRIEF OF CROSS APPELLANTS MACRI

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

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GRAPHIC ART PRESS — SEATTLE

SUBJECT INDEX

STATUTES CITED

JURISDICTION

This action was declared by the amended complaint (Tr. 2, 10) under the Miller Act, U. S. C. A. Title 40, Secs. 270a and 270b; 49 Stat. 793, 794. It was brought in the federal district court for the district in which the federal work involved was performed. The trial court so determined (Tr. 104-5; ff. 18).

Original jurisdiction of the federal district court was neither invoked nor sustained on any other ground. The question of sufficiency of original jurisdiction of such federal district court under the Miller Act in this action is hereby raised.

Appellee Schaefer, as subcontractor, sued as use plaintiff in the name of the United States, under Sec. 270b of the Miller Act. He joined as defendants the principal contractors, Macris, their surety on the payment bond required by Sec. 270a of the Miller Act, and their joint adventurers, for a claimed balance for performances according to the subcontract terms.

This appeal by Macris from the judgment (Tr. 112-115) entered against them (Tr. 136) is pursuant to U. S. C. A. Title 28, Sec. 225; 26 Stat. 828, as amended.

The Circuit Court of Appeals order herein of March 31, 1948, limits the Macris' appeal to review of judgment pertaining to the one subcontract under Specifications 1062-1 Ex. 3, and eliminates all consideration of another subcontract under Specifications 1068.

STATEMENT OF CASE.

The Pivotal Controversies.

The principal contention of law made by these appellants is that where the performance of a subcontract is completed by the subcontractor without oral or written modification, in spite of repeated partial breaches thereof by the principal contractor rendering such performance more costly because of delay, and the subcontractor is paid and without protest accepts the full contract price for his performance, the subcontractor cannot thereafter recover his total cost of performance, including 20% overhead and 10% profit, on the basis of either implied contract or quasi contract; nor can he recover on *any* basis without proving the additional cost of performing the subcontract by reason of the contractor's breach, without complying with the provisions of the subcontract regarding delays, or without having made any attempt to minimize such increased costs. The district court held to the contrary.

These appellants also contend that there is no substantial evidence to support the finding of the district court that the principal contractors breached the subcontract.

Parties Litigant.

This action was commenced by the United States for the use of M. C. Schaefer, doing business as Concrete

Construction Company. Schaefer's action was for a claimed $57,618.87 a *quantum meruit* theory for performance of the subcontracted work after an alleged breach of the subcontract by the principal contractors.

The defendants sued were Sam Macri, Don Macri and Joe Macri, individuals and copartners doing business as Macri Company, the principal contractors; the Continental Casualty Company, a corporation, their surety on the payment bond required and delivered under Sec. 270a of the Miller Act, and the Macri Company's joint adventurers, A. C. Goerig and Clyde Philp.

Such parties litigant will hereafter be referred to, respectively, for the use plaintiff as Schaefer or appellee, for the Macris as Macris or, if referring to Sam Macri only, as Macri, for the surety as Continental, and for the co-adventurers as Goerig & Philp.

CONTRACT AND SUBCONTRACT DOCUMENTS.

The principal contract, numbered 12r-14825, was entered into between Macris, as principal contractors, and the United States, Department of Interior, through the Bureau of Reclamation, on December 7, 1943. The contract and the payment bond by Macris and Continental are Ex. 1. The public work involved was performance of earth work, pipelines and structures, Laterals 59.3 to 69.8 and sublaterals, Roza Divi-

sion, Yakima Project, Washington. That work is variously referred to herein as the Roza Project, as job 1062-1 or 1062, Schedule 1, or job 1062. The Bureau of Reclamation and its representatives are likewise referred to as the "government" and "government officers."

The specifications governing the contracted job work are Ex. 3. At the front thereof, at pages 3 to 5, are shown the 28 items of estimated quantities bid by Macris to a total of $128,550.95 as the estimated contract amount. Such specifications are designated as Specifications 1062-Schedule 1.

The Schaefer subcontract is Ex. 5. It is dated March 14, 1944, and calls for performance of only *2* items (of the *28* items bid by Macris), namely: Item 12, placing an estimated 1515 cubic yards of concrete; and item 13, placing an estimated 12,700 pounds of reinforcing bars. Item 15, erecting an estimated 10,000 board feet measure of timber in structures was an extra work item, paid for as such and is not here involved. Schaefer's bid for performance of such 2 items was $26.00 per cubic yard of concrete installed (Ex. 5, Art. Two, Sec. 1, or an estimated total of $39,390.00.

A preliminary field inspection and study of contract documents by Schaefer are vouched for, to make the subcontract the whole agreement, by the following

provisions thereof at Sec. 15, Article Three (on the last page of Ex. 5):

> "*Contains Entire Agreement.* 15: The Subcontractor has satisfied himself by his own investigation and research, regarding all of the conditions affecting the work and as to the meaning and intention of the plans and specifications referred to herein, and has executed this agreement solely in reliance upon his own investigations, independent of any estimate or other information prepared or furnished by the Owner or by the Principal Contractor. This instrument contains the entire agreement of the parties hereto and no estimate, bid or proposal of the Subcontractor, and no statement, promise, verbal or other agreement not contained herein shall, in any manner, affect or modify any of the terms or provisions herein contained."

A companion responsibility on Schaefer as subcontractor is contained in Sec. 18, Article One (on the third page of Ex. 5):

> "*Lines, Grades and Measurements.* 18: Assume full responsibility for the accuracy of all lines, levels and measurements and their relation to bench marks, property lines, reference lines and the work of the Principal Contractor and of other contractors, or subcontractors. In all cases where dimensions are governed by conditions already established the responsibility for correct knowledge of such conditions shall rest entirely on the Subcontractor. No variation from specified lines or grades or dimensions shall be made except on the written authority of the Principal Contractor. All work shall be made to conform to actual, final conditions as the same develop in the course of

construction and the Subcontractor shall make due allowances for all of these."

That responsibility is coordinated with the additional Schaefer responsibility in Sec. 7, Article One (on the second page of Ex. 5):

> "*Plans and Specifications, Cooperation and Conformance.* 7: Conform strictly to all plans and specifications, approved shop drawings and to any subsequent modifications of all thereof, in accordance with their true intent and meaning. Perform all work and furnish all materials called for in the specifications and not shown on the plans, or shown on the plans and not called for in the specifications, the same as though both shown and called for, as plans and specifications shall be considered as cooperative. All provisions of the specifications affecting said work or materials in any manner, and all requirements of the plans shall be fully complied with the same as if contained in this agreement, except in so far as said provisions are specifically modified or superseded by this agreement."

It was also a subcontract obligation to submit progress schedules *and reports* relating to the work, when, as testified by Schaefer, Macri at the field meeting of April 15, 1945 (hereinafter discussed) told Schaefer to send Macris any bills for any extra work. That is provided for in Sec. 3, Article One (on second page of Ex. 5):

> "*Shop Details, Erection Plans.* 3: *Prepare and submit in such form, and at such times as the Principal Contractor may require, all details, shop*

drawings, setting plans, progress schedules and reports relating to the work." (Italics ours.)

The means by which a subcontractor can designate or have adjusted any type of construction errors, giving Schaefer the means by written notice within 10 days after subcontract execution of specifying and having determined the type of excavation and of fine grading for his work, is found at Sec. 6, Article One (on the second page of Ex. 5):

"*Ambiguities, Conflicts and Discrepancies.* 6: Immediately examine all plans and specifications and all changes and modifications thereof. In case there be any ambiguity, error, discrepancy or conflict in or between this agreement, the plans, the specifications and the addenda, or, in case the Subcontractor feels that any work or materials shown or specified are unsuitable for the use intended, *he shall immediately give written notice thereof to the Principal Contractor.* In the absence of such notice within ten days from the date hereof, and with respect to any changes or modifications within ten days of the date thereof, the plans and specifications and the changes and modifications, as the case may be, shall be deemed to have been accepted by the Subcontractor and he thereby assumes the full responsibility of the Principal Contractor for all ambiguities, errors, discrepancies and conflicts which may exist with respect to the work and for the replacement of any unsuitable work or materials even though they comply with the plans and specifications. If there be any ambiguities, errors or discrepancies or conflicts, or if unsuitable work or materials be called for by the plans and specifications the matter shall be referred to the Principal Contractor for deter-

> mination and its ruling shall be final and conclusive. *If the Subcontractor shall have given notice thereof as in this agreement provided,* then the Principal Contractor (subject to the rights of arbitration as in this agreement provided) shall determine the amounts, if any, of any addition to or deduction from the contract price resulting therefrom, and in arriving at its conclusions shall give precedence to the documents involved in the following order: this agreement; the general conditions of the specifications; the specifications and any addenda to these specifications; the full size detail drawings; the large scale drawings; the small scale drawings; the general design drawings." (Italics ours.)

No such notice was given (Tr. 1452).

Sec. 9 of Article One of such Ex. 5 (also on the second page thereof under the heading "Cooperate with other Subcontractors") provides for 5 days' written notice of any cause for delays in progress of the work by other contract operators, such notice to be given by Schaefer to the Macris as principal contractor. That provision states, for the pertinent third and fourth sentences thereof, as follows:

> "* * * The Subcontractor shall not be entitled to any damages or additional compensation arising from, or *because of* any reasonable orders given or *acts done by the Principal Contractor* for the purpose of coordinating the work of all contractors, subcontractors and material men. *If the Subcontractor shall be delayed* in the performance of the work as a result of such orders or acts, the Subcontractor shall be entitled to an extension of time equal to the delay so caused;

> *provided,* however, that *written notice of the fact and cause of such delay be given* by the Subcontractor to the Principal Contractor *within five days* after the occurrence of the cause of such delay and said extension of time shall be thereafter determined and allowed and specified in writing by the Principal Contractor. * * *"
>
> (Italics ours.)

No such notice was given (Tr. 1452).

Sec. 3 of Article Three of such Ex. 5 (on the fourth page thereof) provides for extra compensation for changes, alterations and additions. The second paragraph of such section provides pertinently:

> "Should any such alteration or deduction involve a change in the quantity or quality or cost of the work required by the terms of this agreement, proper adjustment shall be made in the contract price. In all such cases, the amount to be allowed for such changes shall be determined by the Principal Contractor in advance of the doing of any such work and the decision of the Principal Contractor as to the amount to be allowed therefor shall be final and conclusive between the parties hereto, subject to the right of arbitration as provided herein. No claim for extra compensation on account of any changes shall, however, be allowed unless the same shall have been ordered in writing by the Principal Contractor specifying the price or rate thereof."

No written notice from Schaefer, as subcontractor, was ever given (Tr. 1452).

Sec. 5 of Article Three of such Ex. 5 (on the fourth page under the heading of "Delays") reads for the

pertinent context as follows:

> "If the work hereunder shall be delayed by any *act, neglect or default* of the owner or *of the principal contractor,* or of any other contractor employed by the Owner or the Principal Contractor upon the entire work, * * * through no fault of the Subcontractor then the time herein fixed for completion of the work shall be extended for a period equivalent to the time lost by any or all of the reasons aforesaid; provided, however, that no such extension of time shall be made or allowed unless the Subcontractor shall give the Principal Contractor *notice, in writing, within five days* after the occurrence of any such act, omission or event, specifying the fact and cause of the delay. * * *" (Italics ours.)

No such notice was ever given (Tr. 1452).

Job Facts.

The whole contracted operation for job 1062-1 was a continuing ditch line and feeder ditches for the main laterals and sublaterals to conduct irrigation water along its course on the Roza Project. At the locations in that course where a structure was indicated to be installed for diversion of the water into a sublateral ditch or for an undercrossing of a road, there would be involved, differently than for the main ditching, an excavation for a structure (a Macri item), the installation of a concrete structure (a Schaefer item) and the backfilling and puddling around the completed concrete structure (a Macri item).

The whole course is shown on the map following

page 36 of the specifications (Ex. 3). The distance of the Macris' work involved in job 1062, Schedule 1 (Ex. 3, p. 3) is 10½ miles (Mile 59.3 to Mile 69.8), plus the sublaterals (Tr. 1493, 1494.)

Along this vast network of ditching were 549 concrete structures, including 28 standard weir walls (or 521 box structures net) (Tr. 562). These were a Schaefer subcontract item.

The concrete structures on this job are of the same type as other reclamation project structures throughout the whole Roza Project—*a vast majority thereof being small or box structures* with a maximum depth of 3 feet (Tr. 1783). The number of such box structures shown on the plans, after eliminating duplications and those indicated but not shown, is 368.

Such 368 box structures were classified by the former Bureau of Reclamation engineer Hance (Tr. 1901-3) into five groups, namely:

	No. of Structures		% of the 368	Minimum to Maximum Headwall Height
1.	23	or	6.2%	1½ feet to 2 feet
2.	152	or	41.4%	2½ feet to 3 feet
3.	101	or	27.5%	3½ feet to 4½ feet
4.	54	or	14.6%	4½ feet to 5½ feet
5.	38	or	10.3%	Greater than 5½ feet

Groups 1, 2 and 3, or 74% of the 368 structures, i. e.,

at least 262 structures, had a headwall of less than 4½ feet and a depth below ground surface of about 3½ feet (Tr. 1903).

Access to remove the fasteners—shown by Ex. 44—from the top of the outside wall was available for at least those 262 structures (Tr. 1902-3). *The maximum distance down* for an operator to reach in order to fasten the forms together *was 2 feet 6 inches* (Tr. 1783).

Schaefer's first job superintendent, Waltie, testified that the average depth of the holes was 4 feet (Tr. 719). Schaefer's cement crew foreman Holmes said the excavations averaged 3 feet to 4 feet (Tr. 751). The above tabulation as thus supported by Schaefer testimony was not controverted throughout trial.

Schaefer, after signing the subcontract (Ex. 5) on March 14, 1944, went on to job 1062 on March 16 and 17 and again on April 12, 1944. *Intermediately Schaefer sent no written notice of any kind to Macris* (Tr. 1452).

On April 21, 1944, Schaefer signed at Seattle an additional subcontract (Ex. 6) for similar performance of Macris' second and adjoining prime contract under Specifications 1068. He was next on job 1062 on April 27 through April 29, 1944 (Tr. 366).

On April 28, 1944, Schaefer insisted to Macris' superintendent Staples that Macri be on the job by noon of April 29 and agree to things as Schaefer demanded or that Schaefer would "pull off the job" (Tr. 215).

No provision was asked or inserted by Schaefer in either of the Schaefer subcontracts about width of structure excavations, slope of banks, fine grading, lumber or roads (Ex. 5; Ex. 6). Schafer gave no written notice of any desired change in Ex. 5, as called for by its terms, although Macris' superintendent Staples had discussed details of excavations with Schaefer's job superintendent Waltie and general superintendent, W. E. Schaefer (Tr. 1742-3-4).

Schaefer in his case in chief stated that on April 18, 1944—the first time he himself saw Macris' excavations—(Tr. 205): "The excavations were made vertical. There was no one to one slope. They were made tight.* * *" He testified that "we had set a few structures." Schaefer also told the court that the lumber was wet, causing shrinkage (Tr. 214).

Yet, on April 21, 1944—three days later—Schaefer *did not* make any provision in the second subcontract he signed on that day (Ex. 6) for wider cuts or any slope or fine grading details or lumber specifications. He did not even notify Macris in writing—as called

for by his first subcontract—that he wanted any such change in operations in that subcontract (Ex. 5).

Much controversial testimony at trial pertains to two meetings between Schaefer and Macri on the job on April 29, 1944, and on June 15, 1944, and as to what, if anything, was changed as subcontract responsibilities at such meetings.

Schaefer at the time of the April 29, 1944, meeting with Macri had not yet placed any concrete although forms had been set for receiving concrete and 665 sacks of cement had been delivered to him (Tr. 2143).

Although Schaefer had received 665 sacks of cement from the government and had a small and adequate Jaeger concrete mixer in Portland and although he had the forms set, *he had placed no concrete.* He did not use that cement until late July 1944 (Tr. 2143, 1715, 222).

Schaefer had no concrete-placing equipment on the Roza Project in April 1944 or at all until late July 1944 (Tr. 392). The only equipment he had on job 1062 until the end of July 1944 was a power skill saw, a band saw, a table saw, pick-ups and one truck (Tr. 2191). Macris had furnished Schaefer, without charge and although not required by the subcontract, the job office, form panels already built and 8 or 10 kegs of nails toward cooperation to get Schaefer started (Tr.

1675-6-7).

Schaefer testified that at the April 29, 1944, meeting Macri said he would pay Schaefer for the extra work done, *upon Schaefer sending Macris the bill for that work.* (Tr. 224, 226). No bill for any such extras was sent by Schaefer to Macris (Tr. 1471).

Preceding the June 15, 1944, meeting Schaefer had kept *only two* men on the job after May 3, 1944. He had his job superintendent Waltie absent in Portland after May 24, 1944 (Tr. 1774). The crew said they "had pulled off the job" (Tr. 1774). Waltie himself testified (Tr. 702): "I was actively in charge of the job but we weren't there." He also stated he was in Portland working on another job (Tr. 702).

At the June 15, 1944, meeting with Macri, Schaefer still had his crew and his equipment in the Portland area (Tr. 702).

On the occasions of the April and the June meetings with Macri, Schaefer dictated what he would do and the conditions on which he would do so. On each occasion Schaefer wholly disregarded the above quoted subcontract provisions. At neither meeting did Schaefer extend any new or additional service or consideration or anything that was not already incumbent on him by the subcontract terms (Ex. 5). Both meetings were forced on Macri by Schaefer on

a basis of "be there, or else" he would block Macris' principal contract completion.

That principal contract (Ex. 3, p. 14, pars. 23-24) specified $25.00 per day as liquidated damages for delayed performance beyond the contract alloted time of 400 days.

Ex. 14—the government's progress and final estimates—shows such liquidated damages deducted from Macris' earnings as follows: Estimate No. 11—month of February, 1945, for 17 days, $425.00; No. 12—month of March, 1945, for 28 days, $700.00; and No. 13—final estimate, for 6 additional days in March, $150.00; or a total of $1,275.00 for 51 days' delay. The Schaefer crew was effectively off the job from May 4, 1944 (Tr. 1774) until resuming work on July 29, 1944 (Tr. 1087, 1715)—for a time of subcontract nonperformance considerably in excess of the 51 days of overtime for which Macris were penalized.

Schaefer had over 200 other jobs in progress in the Portland area during the same period for which he had subcontracted performance of job 1062 (Tr. 373). His concrete-placing equipment was used in Portland until the end of July 1944 (Tr. 373, 392). His 1062 job superintendent Waltie worked on another job at Portland after May 24, 1944 (Tr. 702, 1774). Schaefer himself was there "attending to business back in

Portland" (Tr. 372). His crew for the Roza job was in Portland after May 3, 1944 (Tr. 1774), 192 miles away from the Roza job (Tr. 569). All of this was at the height of the construction season.

When Schaefer did resume his subcontract work on job 1062 and *began* placing concrete at the very end of July 1944 (Tr. 1087, 1715) he had passed the best construction months. He had to perform that period's work during the following months and into the winter months. His witness Bufton testified it is always "disastrous" to carry a construction job through the winter (Tr. 1176).

Schaefer took over the subcontracted portion of job 1062, Schedule 1, as of March 14, 1944 (Tr. 202). He finally completed that portion at the very end of March 1945 (Tr. 522, 1531).

Schaefer accepted and cashed the monthly checks—with voucher parts thereof specifying subcontracted work performed (Exs. 99, 127, 128) without notice of any disagreement therewith. This was done monthly after the meeting with Macri on the job June 15, 1944, as well as before. Likewise, Schaefer ordered payments to his creditors by Macris against earned subcontract balance. Similarly he made written application on December 5, 1944 (Ex. 124), to invoke the arbitration provisions contained in the Schaefer sub-

contract (Ex. 5, at Art. Three, Sec. 9), but did not follow through with the directions therein given. Likewise, Schaefer received a letter from the Bureau of Reclamation, dated June 27, 1945 (Ex. 37), addressed to him as subcontractor without disavowing that cantinuing relationship as subcontractor either to the Bureau of Reclamation or to Macris.

(Arbitration prerequisite to suit was waived by Macris at pre-trial conference in order to get trial under way (Tr. 78).)

The official Bureau of Reclamation record of actual job performance is in evidence in a series of government inspectors' field reports, which were *made daily as the field work progressed* (Ex. 13, for respective subnumbers indicated below), also in the government concrete engineer's communication (Ex. 17a), in the job progress and final estimates (Ex. 14), in the government's official communications to Macris of Septemebr 18, 1944 (Ex. 39), with copy to Schaefer and of January 25, 1945, to Schaefer (Ex. 37), and in the context of the deposition of H. T. Nelson, the government engineer in charge throughout performance of job 1062 (Tr. 1490, 1534).

Nelson's deposition was taken at Boise, Idaho, during a trial interim (Tr. 1499), after he telegraphed during trial he was prevented from attending (Tr.

207). The deposition was secured only after continued persistence at trial by the Macris (Tr. 235, 1089 to 1101). It was finally authorized by the court upon condition that the expenses of attendance for Schaefer's attorneys be imposed on Macris (Tr. 1098). This deposition is reported at Tr. 1489-1551. It was read to the court in its entirety, but it is not mentioned in the court's opinion (Tr. 2208-2230). This Nelson deposition (Tr. 1489-1551) contains a dependable, basic grasp of the scope of work and how it progressed.

Nelson in such deposition, at Tr. 1512-14, identifies the five official government inspectors who were in the field and made daily written reports of job performance. Such reports in their entireties were produced at trial. The portions admitted for such respective inspectors are: J. S. Heers, Exs. 13a, b and c; R. M. Moorhead, Exs. 13d-13l; J. R. Reynolds, Ex. 13m and subnumbers; M. Sektnan, Ex. 13-o and subnumbers; and J. A. Costello, Ex. 13n. This Nelson deposition testimony and such current written reports state exact conditions as they progressed on the job. They are an official recounting of unprejudiced facts about the job itself.

Nelson talked with Schaefer at the Bureau of Reclamation office and in the field with Schaefer's second

superintendent Darcy about excavations for structures and government basis of payment therefor, while such excavation work was in progress (Tr. 1526).

No written notice from Schaefer to Macri about excavations, however, was ever given, although called for by the subcontract (Ex. 5), in case any change was desired or any extra compensation was to be claimed (Tr. 1452).

Nelson, as the government engineer in charge, was asked on cross-examination about excavations, and answered (Tr. 1538):

> "Q. It is also a fact, is it not, Mr. Nelson, that in order for the Concrete Construction Company to assemble and place its structure forms in the excavation, it was necessary that the excavation itself first be completed, so as to receive the structure forms?
>
> "A. It's necessary that the hole be large enough to accommodate the form, yes."

Similarly, still on cross-examination, Nelson testified about subgrade (Tr. 1538-9):

> "Q. And if the sub-elevation or subgrade was too low, that in each instance would require additional concrete so that the completed floor of the concrete structure was brought to the required grade as required by your grade lay-out plans?
>
> "A. Yes, *except that the field inspectors were under instructions to watch for excessive over-excavation,* in which case compaction could be required, thus bringing the subgrade back to grade,

in lieu of the more expensive way of filling by use of concrete. * * *

"Q. And that again would have to be done before your field inspectors would permit the pouring of the concrete in the structures?

"A. Yes. *I am not saying that that occurred;* I am saying that that would be our requirement, if what you say is correct." (Italics ours.)

Nelson further testified, when he had been asked whether there had to be "a considerable hand excavation" before setting forms, as follows (Tr. 1542-3):

"Q. Now, in the excavation of these structure holes, in addition to the rough excavation which could be done by a shovel, there had to be considerable hand excavation before the forms could be installed and the concrete poured; isn't that true?

"A. Yes. *I wouldn't say as to relative amounts.* I would say in every case *there is a certain amount* of required hand-trimming, *especially in corners that cannot be reached by a machine, and* in narrow headwalls, and in cut-off walls, *below grade."* (Italics ours.)

Nelson further stated, still on cross-examination, as to head-wall excavations, at Tr. 1543-4, as follows:

"A. * * * *I might say we try to encourage holding the excavation of head-walls down to the minimum widths,* if we could, because the backfill was objectionable to us. *We preferred the natural ground to backfill, if it were possible to obtain."* (Italics ours.)

On direct examination Nelson established that the

exactions of the government as to absolute compliance with the lay-out details (Ex. 12) was not expected in measuring for pay quantities. His statement is found at Tr. 1544-5:

> "Q. Mr. Nelson, in measuring for pay quantity on Specification 1062-1, was complete compliance with the measurements as indicated on the structure lay-out drawings required, as against the complete adaptability of the structure to the purpose of the project? * * *
>
> "A. We insisted upon full compliance to the lines and grades *insofar as they might affect the hydraulic properties of the structure.* However, we did encourage the carpenter foreman of our various contracts to standardize if it was possible, possible for them to do so. * * * And *we found it undesirable to consider those lay-out drawings as too rigid,* except insofar as hydraulic properties were concerned, because different contractors had different ideas as to how they were going to perform this construction." (Italics ours.)

Nelson testified with respect to the lumber scarcity and job readjustment accordingly at that time (Tr. 1528-9):

> "A. I certainly am not an expert on the national lumber situation. I can say, however, that in all our experience with all our contractors on the project at that time, shortage of lumber was very pronounced on every contract. * * *
>
> "Q. Can you tell me whether or not there were any less restrictive requirements by the Bureau of Reclamation as to grades of lumber or moisture content of lumber, during the period covered in

performance of Specification 1062-1 than previously? * * *

"A. The restrictions are always as provided for in the specifications, but our enforcement of those restrictions was tempered by conditions prevailing at that time; in other words, we did not strictly enforce those provisions."

That national shortage of lumber was further established by Schaefer's own witnesses at trial: Tr. 389, M. C. Schaefer; Tr. 641, Stickney; Tr. 800, Mercille; Tr. 1124, W. E. Schaefer; and Tr. 1179, 1210, Bufton. Similar national lumber acuteness was established by defense witnesses: Tr. 1817, Anderson; Tr. 1853, Ashley; Tr. 2052, 2058, Klugg. *No witness denied the national lumber shortage.* Schaefer did not buy any lumber himself (Tr. 394).

Nelson also established that Schaefer's second job superintendent Darcy, while he constantly complained, was never stopped by shortage of lumber (Tr. 1530, 1532-4).

Macri had no written notice about any insufficiency of lumber (Tr. 1595).

The Bureau of Reclamation did not make demands for any of the exactions or niceties regarding excavation for structures, fine grading of structures or lumber quality, which Schaefer directly, and through his first job foreman Waltie and his second job foreman

Darcy, detailed in court as Macri's shortcomings.

Macris did not receive any written notice from Schaefer, as called for by Ex. 5. Macri did not receive any notice from the government about any excavations (Tr. 1589-90) or lumber (Tr. 1595).

The trial court opinion states, with respect to the lack of meeting of the minds between Schaefer and Macri at either the April or June 1944 meetings, as follows (Tr. 2214-15):

> "* * * the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct isn't consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services."

In spite of this finding, however, the court then held (Tr. 2215):

> "* * * it is the view of the court that there was

> an implied contract, or perhaps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach" (id. Tr. 108; ff. 15),

Schaefer sued Macris, their surety Continental, and their co-adventurers, Goerig & Philp, alleging a substitute oral contract, for the written subcontract (Ex. 5), to pay Schaefer all expenses for performance of the work called for by Ex. 5, and, in the alternative, for paying Schaefer the reasonable value of all his services. He sued for $57,618.87 in addition to the $32,-614.66 he had received as subcontract progress payments from Macris (Ex. 8). The district court found that Macris had been guilty of a continuing breach of the subcontract in these particulars: Lack of reasonable clearance in and delayed furnishing of structure excavations to enable Schaefer to proceed with prompt progress (ff. 12; Tr. 100-1); defective fine grading of structure excavations, increasing Schaefer's work and hindering and interfering with his progress (ff. 12; Tr. 101) and insufficient quantities and qualities of lumber, and that lumber was not timely furnished (ff. 13; Tr. 101-2).

The district court judgment against Macris in favor of Schaefer was for $56,764.97, principal amount, plus

interest and costs (Tr. 113), in addition to the $32,-614.66 he had received from Macris on current estimate payments (Ex. 14, monthly estimates). It also awarded *unqualifiedly, instead of conditionally* through payment to Schaefer, a judgment against Macris in favor of Continental for an additional $56,764.97, plus $1,750.00 attorneys' fees.

The judgment did not make any provision for protection of the Macris against the levy by the United States (Ex. 67; Tr. 34, par. 6; Tr. 40-46) for asserted collection and nonpayment by Schaefer of withholding tax, employment tax F. I. C. A., employment tax F. U. T. A., and income tax.

The total amount of all earnings at Macri bid units for the 2 items subcontracted by Schaefer, namely, Items 12 and 13, and with Item 15 as an extra work item of 1062-1, was $48,915.07 (Ex. 61; Items 12, 13 and 15). All earnings on the only Macri items correlated to the said Schaefer items were Item 7, excavation, common for structures, $3,756.25, Item 8, excavation, rock for structures, $739.20, Item 9, backfiell against structures, $1,863.00, Item 10, puddling and tamping backfill, $2,035.68 (Ex. 61; Items 7, 8, 9 and 10). These totaled $7,694.13. *The court's judgment amount of $56,764.97 is, therefore, more than 7½ times the total earnings of all Macris' items (Items 7, 8, 9*

and 10) correlated to the items subcontracted by Schaefer.

The Schaefer subcontract items and such 4 Macri items combined totaled $56,609.20 (Ex. 61; Items 7, 8, 9, 10, 12, 13 and 15) as against the judgment award to Schaefer of $56,764.97, plus the $32,614.66 previously paid to him, to total $89,379.63, or $32,770.43 more than the total earned in both the said Schaefer items and the said Macri correlated items. *Yet, Macris, but not Schaefer, performed all of the correlated Items 7, 8, 9 and 10.*

The district court arrived at its judgment figure in favor of Schaefer by taking the alleged summary of Schaefer's costs without admitting Schaefer's books and accounts, after deducting from the total of $90,-223.53 of such summary only certain small items of Schaefer trial preparation expense and the like, but charging both overhead and profit items (Tr. 1241-2, 1252-1264).

In connection therewith we respectfully refer this appellate court to pages 20-22 of the brief of Continental Casualty Company covering the testimony of appellant's accountant Hendershott, the full context of which portion of such pages we here adopt by reference to establish that the Hendershott compilation (Ex. 63)—used as a basis by the district court for its

judgment—was made without either a segregation on Schaefer's books or without any attempt by Hendershott to make independent segregation for such accounting.

Further, in connection therewith and for the purpose of establishing that Schaefer intentionally kept no costs of any additional work and that he made no billing of any such costs to Macri, we respectfully refer this appellate court to pages 13-17, inclusive, of the said Continental brief, the full context of which pages we here adopt by reference.

THE JUDGMENT.

Trial was by the court without a jury, after use plaintiff's demand for jury was waived. At conclusion the court announced decision (Tr. 2208-30), later made findings of fact and conclusions of law (Tr. 94-111), and on May 1, 1947, entered judgment for aforesaid $56,764.97, plus 6% interest from judgment date and $921.70 costs, in Schaefer's favor against Macris and their surety, Continental; and also judgment in favor of Continental against Macris, unconditionally instead of qualifiedly collectible only upon payment to Schaefer by Continental, for the sum of $56,764.97, for like interest and for $1,750.00 attorneys' fees (Tr. 112-115). Other features of the judgment pertain to Macris' cross-complaint, Goerig & Philp's

cross-complaint and to Specifications 1068, which are not now involved in the Macris' appeal by reason of the aforesaid Circuit Court of Appeals' order of March 31, 1948.

Macris defended at trial, on the grounds which will be urged on this appeal and which are set forth herein under their "Summary of Argument."

SPECIFICATIONS OF ERRORS.

The district court erred:

1. In denying additional appellants Macris' motion for dismissal of the action pertaining to Specification 1062-1 at the close of the use plaintiff's case in chief (Tr. 1374-5).

2. In denying these additional appellants' motion for dismissal of action pertaining to Specification 1062-1 at the close of all the evidence (Tr. 2205).

3. In rejecting the Schaefer books and claimed original entries of the subcontract job account when offered in evidence by Schaefer without objection by Macris but objected to by Goerig & Philp upon wholly insufficient legal grounds. The rejected exhibits (which Schaefer immediately withdrew) were numbered 52, 53 and 53a to 53h, inclusive, and were the purported books and records of original entries upon which Ex. 63 (the Hendershott compilation on

which the district court based its judgment amount) could possibly be founded. The record on this is found at Tr. 2201-2, where, when offered "for the purpose of the record," the following occurred (Tr. 2202):

> "The Court: Do you have an objection?
> "Mr. Holman: No objection, your Honor.
> "The Court: I question again that all of those things should go in here. We've got a record that's going to be tremendously voluminous, and, of course, I suppose you don't have to take up any more of this than you want to on appeal.
> "Mr. Hawkins: Well, I'll make an objection. I haven't really examined those documents, I don't know what's in them, but I do know that there is a certain amount of self-serving statements in there, so I'll interpose an objection on those.
> "The Court: The objection will be sustained. We seem to have difficulty getting an objection here. It was quite the reverse at the beginning of the trial."

This was confiscatory of additional appellants' inherent rights to have the proffered exhibits remain available for argument and for review on this appeal.

4. In making finding of fact No. 12 and the whole thereof (Tr. 100-1) and specifically in finding therein that the "clearance reasonably required where a form had to be placed between the concrete and the bank" needed "a slope of one to one on the bank", because such finding of fact is contrary to any substantial evidence and contrary to the requirements of job 1062

specifications (Ex. 3).

5. Further, in making said finding of fact No. 12, for the second paragraph thereof (Tr. 101), and specifically in finding therein that Macris "failed to do the fine grading *in accordance with the lay-out plans and specifications,*" because the same is contrary to any substantial evidence, to the provisions of job 1062 specifications (Ex. 3) and to the terms of the subcontract (Ex. 5). (Italics ours.)

6. In making finding of fact No. 13, and the whole thereof (Tr. 101-2) on the ground and for the reason that it is contrary to any substantial evidence.

7. In making finding of fact No. 14, and the whole thereof (Tr. 102), and specifically in finding therein that Macris "breached their subcontract" and that the breach so found "was wilful and negligent" and "was a continuing breach," because the same is contrary to law, to any substantial evidence to job specification 1062 (Ex. 3) and to the terms of the subcontract (Ex. 5).

8. In making finding of fact No. 15 (Tr. 102-3), and the whole thereof, and specifically in finding that "there was an implied agreement or a quasi-contract" between Macris and Schaefer to provide that Schaefer "was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra

burdens'' imposed upon Schaefer by Macris, because the same is contrary to law, to any substantial evidence, to the provisions of job specification 1062-1 (Ex. 3) and to the terms of the subcontract (Ex. 5).

9. In making finding of fact No. 16, and the whole thereof (Tr. 103-4), and specifically in finding therein that labor, materials and services furnished by Schaefer were of a reasonable cost and value of $89,498.71 or any other sum (except the subcontract price of $26.00 per cubic yard for 1356.697 cubic yards of concrete placed under Item 12, as shown by job 1062 final estimate (Ex. 61), amounting to $34,974.03 gross earnings, less therefrom the sum of $32,614.66 paid thereon under job 1062 progress and final estimates (Item 12 on Ex. 14), but subject to United States Treasury Department levy under Ex. 67 as found by finding of fact No. 20 at Tr. 105), because said finding of fact No. 16, and the whole thereof, and specifically the aforesaid part thereof, is contrary to law, to any substantial evidence, to the provisions of job 1062-1 specifications (Ex. 3) and to the terms of the subcontract (Ex. 5).

10. In making conclusion of law No. 1 (Tr. 109-110) that Schaefer should recover judgment against Macris in the sum of $56,764.97 and interest and costs, or any other sum (except for the amount of balance made

subject to the United States Treasury Department levy as above specified in specifications of errors No. 9 and here incorporated by reference), because Macris are not liable for more than the agreed subcontract price, and because the said conclusion is contrary to law, to the provisions of Specifications 1062-1 (Ex. 3) and to the terms of the subcontract (Ex. 5).

11. In making conclusion of law No. 3, and the whole thereof (Tr. 110), against Macris in the amount of $56,764.97, or for any other sum, with interest and attorneys' fees, as an unconditional judgment in favor of appellant Continental, instead of as conditioned upon prior payment by Continental to Schaefer of the amount before becoming effective against Macris, because the same as entered is contrary to law, to the provisions of Specifications 1062-1 (Ex. 3) and particularly of Sec. 1, subdivision b on page 9 of Ex. 3, and to the terms of the subcontract (Ex. 5).

12. In making conclusion of law No. 8 (Tr. 111) as based on finding of fact No. 2 (Tr. 95) and on Ex. 59 mentioned in said finding of fact No. 2, because Schaefer did not timely file a certificate of assumed trade name as Concrete Construction Company in the county and district in the State of Washington in which the public work involved was performed (Tr. 140, 179, 180, 670-673).

13. In failing to grant Macris' motion to dismiss

Schaefer's action for failure to file certificate of assumed trade name of Concrete Construction Company until after the commencement of trial (Tr. 179) and until after motion to dismiss for want of such compliance had been interposed by Macris (Tr. 140, 179, 180, 670-673).

14. In entering any judgment in favor of Schaefer because Schaefer had failed to comply with Sec. 9976-9980, and particularly Sec. 9980, Rem. Rev. Stat. of Washington, pertaining to prerequisite filing of Schaefer's assumed trade name of Concrete Construction Company before bringing any action (Tr. 140, 179, 180, 670-673).

15. In entering judgment (Tr. 113) in favor of Schaefer against Macris for the sum of $56,764.97 and interest and costs, or any other sum (except for the amount of balance and subject to the United States Treasury Department levy as above specified in specifications of error No. 9 and here incorporated by reference).

16. In entering judgment (Tr. 114) in favor of appellant Continental against Macris for the sum of $56,764.97 and interest and attorneys' fees, or for any other sum in the manner unconditionally provided in said judgment, because any amount of judgment in favor of said Continental should be qualifiedly limited

and made subject to a prior payment by Continental to Schaefer of the amount of judgment in favor of Schaefer specified in said judgment.

17. In failing to provide in the judgment (Tr. 112-5) for any protection for Macris against the United States Treasury Department levy against any funds due Schaefer by Macris (Ex. 67) for amounts claimed collected by Schaefer and due the United States for withholding tax, employment tax F.I.C.A., employment tax F.U.T.A. and income tax (Tr. 40-46), after the district court had made finding of fact No. 20 (Tr. 105) that such levy and claim had been made and had also made conclusion of law No. 7 (Tr. 111) that "the judgment of the use plaintiff to be entered herein shall be subject" to such lien, because the omission of such protection to Macris is contrary to law, is contrary to said finding of fact No. 20, to said conclusion of law No. 7 and the court's oral pronouncement (Tr. 2227).

18. In entering any judgment against Macris in favor of Schaefer because the relationship between Macris and Schaefer were contractual and were based on written contract and subcontract in evidence as Exs. 1, 3 and 5, which contract and subcontract were not in any manner abrogated, superseded or rendered nugatory (Tr. 138-9).

19. In entering any judgment against Macris in favor of Schaefer under Specifications 1062-1 for the reason that there was a failure of any competent proof of any amount to support the judgment entered in favor of Schaefer (Tr. 138-9).

20. In concluding and holding that Macris are liable for any claimed overhead costs to Schaefer (Tr. 2222) and any asserted loss of profits to Schaefer as subcontractor on job 1062-1, on *quantum meruit* basis or any other basis without complete proof thereof.

21. In failing and refusing to determine that any sum other than $34,974.03, gross earnings, as represented by 1356.697 cubic yards of concrete placed at $26.00 per cubic yard as the subcontract price (Ex. 5) less all payments made thereon by Macris to Schaefer, is the amount payable to Schaefer by Macris, subject, however, to such unpaid balance being first freed from the United States Treasury Department notice of levy for funds withheld from the United States by Schaefer as shown by Ex. 67.

ARGUMENT

Summary of Argument.

1. Any breaches of the subcontract by Macris were partial breaches only, not a total breach, as the same were so treated by Schaefer. Therefore, the subcontract continued in existence, was performed, and could

not, at the will of the subcontractor, be terminated after complete performance thereof.

2. Schaefer is not entitled to recover the alleged reasonable value of his performance of the subcontract as measured by his total cost, including profit and overhead, on the basis of either implied contract or *quasi* contract. *An implied contract* cannot be raised contrary to the express terms of a written contract or contrary to the conduct and oral declarations of the parties. The right to rescind an express contract and recover on *quasi contract* for the reasonable value of wages and materials is available only in the case of a total breach of contract.

3. Schaefer's right of action, if any, is an action for damages for partial breach of contract. The proper measure of damages is the increased cost of performance of the subcontract resulting from Macris' alleged failures. The burden of proof is on Schaefer to prove his damages, and such increased cost of performance was not proven. The action should have been dismissed or nominal damages only allowed.

4. The alleged failures of Macris were only delay factors. Schaefer is not entitled to recover therefor under the terms of the subcontract.

5. Schaefer was required to minimize his damages

and cannot recover in excess of the unavoidable consequences of Macris' alleged breaches.

6. Schaefer's failure to comply with *Rem. Rev. Stat.,* Sec. 9980, prohibits entry of judgment in his favor.

7. There is no substantial evidence to support the decision of the district court that Macris breached the subcontract.

Appellee in his complaint sought to recover upon an alleged oral agreement with Macris superseding the written subcontract with respect to the fixed fee basis for payment and substituting instead the alleged oral agreement to pay for his performance of 1062 on a cost plus profits and overhead basis. In line with this theory Schaefer presented evidence of what his costs were, including an arbitrary percentage thereof for profit and overhead. But, though it appeared records were kept (Tr. 599, 561), no proof was offered as to the increased cost of Schaefer's performance resulting from the alleged failures on the part of the Macris (Tr. 1298-9). The district court found from the evidence that no such oral agreement had been entered into by Schaefer and Macris (Tr. 2214). The court then concluded that Schaefer was entitled to recover on implied contract or on *quasi* contract the reasonable value of his services in the performance of the

entire subcontract as measured by his total cost of performance and including an estimated overhead and estimated profit allowance, without regard to the price fixed by the subcontract for such performance (Tr. 2215).

It is respectfully submitted that a critical application of the fundamental principles of the law of contracts relating to breaches, remedies, and damages will reveal that, in so doing, the district court erred.

1. Only the Remedies for Partial Breach of Contract Are Available to Schaefer.

No doubt much of the confusion which exists with respect to remedies available to a party who has suffered from the breach of a contract is due to recurrent failure on the part of authors of judicial opinions to distinguish carefully in each instance between a total breach of contract, a partial breach of contract, and a breach which, though otherwise constituting a total breach of contract, is so treated by the other party that it acquires the effect of a partial breach only. However, as the authorities below disclose, this distinction is important from the standpoint of remedies available therefor.

Restatement of the Law of Contracts, Sec. 313, defines a total and a partial breach of contract as follows:

"(1) A *total breach* of contract is a breach where remedial rights provided by law are substituted for all the existing contractual rights, or can be so substituted by the injured party.

"(2) A *partial breach* of contract is a breach where remedial rights provided by law can be substituted by the injured party for only a part of the existing contractual rights." (Italics ours.)

In Comment c to this section it is explained:

"c. Though a breach to any extent of a contractual duty of immediate performance gives rise to a right of action, a slight breach does not terminate the duty of the injured person or the right of the party committing the breach, unless nonperformance of an express condition requires this result. In spite of a slight breach the promisor may perform the remainder of the contract and be subject merely to a remedial duty to give compensation in damages for the slight default. * * *"

As to when a breach of contract is a total breach and when a partial breach, it is stated in Sec. 317, Subsection (1), *Restatement of the Law of Contracts:*

"(1) Except as stated in Sec. 316, any breach of contract is total if it consists of such nonperformance of a promise or of such prevention or hindrance as is either material under the rules stated in Secs. 275, 276 or is accompanied or followed by one of the acts of repudiation enumerated in Sec. 318."

Section 275 sets forth the circumstances influential in a determination of the materiality of a failure fully

to perform a promise, and Comment a thereof states:

> "a. It is impossible to lay down a rule that can be applied with mathematical exactness to answer the problem—when does a failure to perform a promise discharge the duty to perform the return promise for an agreed exchange. * * *"

See also 12 *Am. Jur., Contracts,* Sec. 389.

In this case, however, there is no necessity for speculating as to whether or not under the circumstances the alleged failures on the part of Macris were material to the point of constituting a total breach of the subcontract. Assuming for argument, that such failures were material and that the cost of his performance was increased thereby, it still is not disputed that Schaefer continued to perform the subcontract and completed the performance of the subcontract. Where such is the case, the *Restatement of the Law of Contracts,* Sec. 317, Subsection (2), sets forth the rule:

> "(2) Where there has been such a total breach of contract as is stated in Subsection (1), the injured party may by continuance or assenting to the continuance of performance, or by otherwise manifesting an intention so to do, treat the breach as partial, * * *"

The following illustration is given for this subsection:

> "7. A contracts to sell and deliver to B 100 tons of coal in each of six successive weeks, and B contracts to pay for them. A commits a breach, total because of its materiality. B nevertheless accepts a subsequent delivery. The breach can thereafter be treated only as partial."

Thus, whether Macris' imputed failures were by nature total or partial breaches of the subcontract, they were treated as partial by Schaefer, who elected to continue with the performance of the subcontract. Nor is it necessary to dispute, although we do, the label of "continuing breach" attached by the court to Macris' performance of 1062 items related to the subcontract (Tr. 2213). Schaefer just as truly continued to treat such breach as partial by continuing his performance thereafter and accepting further and final performance by Macris, that is, final payment of the subcontract price (less only the percentage retained by the government and subject to government levy).

There is no judicial departure from the rules set forth in the section of *Restatement of the Law of Contracts* discussed above. See *Williston on Contracts* (Rev. ed.), Vol. 5, Sec. 1290; *Fry v. Grangers' Warehouse Co.* (1924), 131 Wash. 497, 230 Pac. 423; *Bankers Trust Co. v. Am. Surety Co.,* 112 Wash. 172, 191 Pac. 845; *U. S. v. Zara* (CCA-2nd, 1944), 146 F. (2) 606; *Ken. Nat. Gas Co. v. Ind. Gas & C. Corp.* (CCA-7th, 1942), 129 F. (2) 17, 143 A. L. R. 484. Certiorari denied. 317 U. S. 678, 87 L. Ed. 544, 63 Sup. Ct. 161; and *Ann.* 143 A. L. R. at 489.

The important difference between the effect of a total breach of contract treated as such by the injured

party and a partial breach or a total breach treated as a partial breach is that in the former case the contract is terminated by the breach and is at an end, except for the purposes of a suit on the contract for damages, while in the latter case the contract is still in existence and determinative of the rights of the parties. So, in the instant case, Schaefer, though complaining and objecting, elected to treat any failures on the part of the Macris as partial breaches and not as total breaches of the subcontract. By virtue of his determination so to do, the contract remained in force and effect, and performance thereof was also completed on the part of Macris, the final act thereof being payment of the contract price to Schaefer for his performance (save only the retained percentage). Consequently, all that remains to Schaefer, if anything, is his right of action for the partial breach or breaches of the subcontract by Macris; and Macris have as great a right as Schaefer to hold firmly to the terms of the subcontract, including the subcontract price. 12 Am. Jur., Contracts, Sec. 390, (Appendix 1).

2. Schaefer Is Not Entitled to Recover on Either Implied Contract or Quasi Contract.

"Contracts are express or implied. Implied contracts are implied in fact or in law. * * * Contracts implied in fact are inferred from the facts and circumstances of the case, * * * their agreement is arrived

at by a consideration of their acts and conduct, * * *. An implied (in fact) contract between two parties is only raised when the facts are such that an intent may fairly be inferred on their part to make such a contract." (Ours) *12 Am. Jur., Contracts,* Sec. 4, pp. 498-500. *Chandler v. Wash. Toll Bridge Authority,* 17 Wn. (2d) 591, 137 P. (2) 97; *Western Asphalt Co. v. Valle,* 25 Wn. (2d) 428, 171 P. (2) 159.

The district court held (Tr. 2214):

> "However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct isn't consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services."

The court then held, in the paragraph immediately following (Tr. 2215):

> "* * * In other words, it is the view of the court that there was an implied contract, or per-

> haps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach."

Manifestly, the district court is in error if in using the term implied contract in the preceding quotation the court had in mind "an implied in fact" contract. For the court had just held that the oral declarations, acts and conduct of Schaefer and Macri were inconsistent with the "implied or *quasi*" contract raised by the court that Schaefer was to be paid the reasonable value of his performance without regard to the subcontract price. There could be no such agreement implied in fact under the authorities above nor under the following: *2 Fed. Law of Contracts,* Sec. 527; *Hubbard v. New York, etc. Inv. Co.* (1886), 119 U. S. 696, 30 L. Ed. 538, 7 Sup. Ct. 353; *Stewart v. Fulton* (CCA 5th, 1911), 184 Fed. 719; *Sells v. City of Chicago* (CCA 7th, 1912), 120 CCA 212, 201 Fed. 874; *Barnett v. Beggs* (CCA 8th, 1928), 26 F. (2) 442; *Cope v. Beaumont* (CCA 3rd, 1910), 181 Fed. 756.

Recovery by Schaefer for the reasonable value of his entire performance without regard to the subcontract price cannot be supported on the basis of an implied in law or *quasi* contract either. It has been seen under the authorities heretofore discussed that

there was at all times in existence between the parties a valid subcontract. It is fundamental that there can be no recovery in *quasi* contract where there is a valid contract between the parties. *2 Fed. Law of Contracts,* Sec. 493; *Cleve v. U. S.,* 263 U. S. 188, 68 L. Ed. 244, 44 Sup. Ct. 58; *Nelson v. Seattle,* 180 Wash. 1, 9, 38 P. (2) 1034; *McBride v. Callahan,* 173 Wash. 609, 24 P. (2) 105; *Frazier-Davis Const. Co. v. U. S.,* 100 Ct. Cl. 120; 12 *Am. Jur., Contracts,* Sec. 7, p. 505, and authorities cited; *Kennedy v. B. A. Gardetto, Inc.,* 306 Mass, 212, 27 N. E. (2) 957, 129 A. L. R. 453; *Champion v. Hammer,* Ore. , 169 P. (2) 119; *Rose Funeral Home v. Julian,* 176 Tenn. 534, 144 S. W. (2) 755, 131 A. L. R. 858.

Where the parties have entered into a valid contract, recovery in *quasi contract* as for *quantum meriut* is limited to a situation in which there has been a total breach of the contract and an election on the part of the non-breaching party to rescind and sue in *quasi* contract or *quantum meruit. Restatement of Contracts,* Sec. 347.

It is stated in *Hawkins v. U. S.* (1887), 96 U. S. 689, 24 L. Ed. 607, at 610:

> "Hence the rule is, that, if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, or for money paid, must declare upon the written

> agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a *quantum meruit.*"

The above statement is quoted in *2 Fed. Law of Contracts,* Sec. 496, page 315. See also cases therein cited.

> *2 Fed. Law on Contracts,* Sec. 487:
> "It is a familiar principle of law, that, where circumstances occur which authorize a party to rescind a contract, he must elect whether he will rescind or whether he will pursue his remedies under the contract; he cannot do both; and a party may by continuing to treat the contract as in force waive a prior cause for recission. Thus the right of a party, who contracted to dress stone to be delivered to him by the other party, to rescind because of a delay in the delivery of the stone is waived where he received and dressed a large part of the stone after shipments to him had been resumed."

The quotation above referred to the case of *Graham v. U. S.* (CCA 4th, 1911), 188 Fed. 651, 110 CCA 465. See also *2 Fed. Law on Contracts,* Sec. 492. It is for this reason that the case of *U. S. v. Zara Cont. Co.,* 146 F. (2) 606, is not in point, for that case in so far as recovery in *quantum meruit* is concerned involved a total breach of the contract, and the court held that the plaintiff's claim for extra compensation in addition to the contract was precluded if he had been forced to rely upon the contract (at pp. 609-610).

It is submitted that the district court in following

the case of *McDonald v. Supple,* 96 Ore. 486, 190 Pac. 315, committed error. The *McDonald* case is based upon the theory of abandonment of the contract by mutual acquiescence. See *Feldschau v. Clatsop Co.,* 117 Ore. 482, 244 Pac. 528. This is also the basis of the decision in the case of *Hayden v. City of Astoria,* 74 Ore. 525, 145 Pac. 1072, which is cited and relied upon in the *McDonald* case. In the later opinion in the same case, 164 Pac. 729, at 732-3, the court applies the correct rule of recovery, that is, contract price plus the cost of the additional burdens of performance. The same is true of the case of *Salt Lake City v. Smith,* 104 Fed. 457, 43 CCA 637, and the case of *Ingle v. Jones,* 2 Wall. (69 U. S.) 1, 17 L. Ed. 762 (Appendix 2), both of which are cited in the *McDonald* case.

The cases in which recovery is allowed for the reasonable value of part performance rendered and followed by a total breach of contract should also be carefully distinguished. In these cases recovery is limited to the contract price. *Great Lakes Const. Co. v. Republican Creosoting Co.* (CCA 8th), 139 F. (2) 456.

Recission and recovery in quasi contract is not allowed where full performance or substantial performance has been rendered. *Restatement of Contracts,* Sec. 350; *Wray v. Young,* 122 Wash. 330, 210 Pac. 794; *Rozzano v. Moore,* 175 Wash. 566, 27 P. (2d) 1096;

Marrazzo v. Orino, 194 Wash. 364, 78 P. (2d) 181; *Nelson v. Seattle,* 180 Wash. 1, 38 P. (2d) 1034; *U. S. v. Wyckoff Pipe & Creosoting Co.,* 271 U. S. 263, 46 Sup. Ct. 503, 504, 70 L. Ed. 938. The *Wyckoff* case, last cited, is controlling of the principles herein discussed. (Appendix 3.)

Recovery cannot be supported on a *quasi* contract theory with respect to the alleged extra burdens of Schaefer's performance because there has been no segregation of the cost or value of the performance of such burdens from the work done under the subcontract (Tr. 2154-5). *Nelson v. Seattle,* 180 Wash. 1, 38 P. (2d) 1034; *U. S. v. Wyckoff Pipe & C. Co.,* 271 U. S. 263, 46 Sup. Ct. 503, 70 L. Ed. 938. Nor did Schaefer qualify for such extra compensation under the terms of the subcontract (Ex. 5, Art. 3, Sec. 3). Schaefer's work beyond dispute, was performed under and for the purpose of accomplishing the work called for by the subcontract.

Under the authorities above and others too numerous to cite, he cannot recover in excess of the contract price in either implied in fact contract or *quasi* contract. The proper legal effect assignable to the finding of the court (Tr. 2215) that Macri made representations to Schaefer during the performance of the job that the bad conditions would be remedied is that such representations would prevent Schaefer's continued

performance of the subcontract from constituting in itself a waiver of his right of action on the contract for damages occasioned by Macris' alleged failures.

Therefore, it is submitted, that the district court erred in entering judgment in favor of Schaefer upon the basis of implied or *quasi* contract. It only remains to be determined whether or not under the evidence present there is any alternative ground upon which the district court's judgment can be sustained.

3. Schaefer's Only Right of Action Against Macris Is on the Subcontract for Damages Occasioned by Macris' Partial Breach.

The remedies available for breach of contract are: (1) An action on the contract for damages; (2) rescission, and restitution or recovery in *quantum meruit;* and (3) specific performance. *Restatement of Contracts,* Sec. 326. Rescission and recovery in *quantum meruit* are not available because Macris' breach was treated as partial and the right to rescind was waived by continued and complete performance of the contract. Performance of the subcontract having been completed, the remedy of specific performance is not available. There is left to Schaefer only an action on the contract for damages.

The normal rule of damages in an action for breach of contract is that the plaintiff may recover for those

damages which naturally and necessarily result from the injury complained of and which were within the contemplation of the parties at the time the contract was entered into. *Carroll v. Caine,* 27 Wash. 402, at 406, 67 Pac. 993; *Florence Fish Co. v. Everett Packing Co.,* 111 Wash. 1, 188 Pac. 792; *Peterson v. Denny-Renton Clay & Coal Co.,* 89 Wash. 141, 154 Pac. 123; *Guerini Stone Co. v. P. J. Carlin Const. Co.,* 248 U. S. 334, 39 Sup. Ct. 102, 63 L. Ed. 275; *Restatement of Contracts,* Sec. 346.

It is elementary that the burden is upon the plaintiff to prove his damages and that the same may not be recovered unless proved with reasonable certainty, speculative damages not being recoverable. It is also fundamental that in an action for breach of contract the breaching party is not required to pay for the plaintiff's poor bargain, that is, losing contract, as an element of the plaintiff's damages.

In the instant case, the only proper recovery by Schaefer would be for the increased cost of his performance, if any, occasioned by the delay resulting from the alleged failures of the Macris, and such increased costs must be proven. Such is the holding of the case of *U. S. v. Wyckoff Pipe & C. Co.,* 271 U. S. 263, 46 Sup. Ct. 503, 504, 70 L. Ed. 938, which is controlling of the decision here. In that case the Wyckoff

Pipe & C. Co. brought an action to recover damages against the government for breaching a construction contract and thereby delaying performance. The Wyckoff Co. was without fault and the government's delays confessedly caused the contractor some loss. The government paid the fixed contract price, plus an additional amount equal to 50% of the increase in labor cost as provided in the contract. Nothing else was paid on account of the damages caused by its delay. Suit was brought in the Court of Claims to recover compensation for the loss suffered and judgment was entered in the amount of $10,122.99. Findings in the case recited that the record did not disclose by items the extra expense incurred by the contractor by reason of the delay in the performance of the work. The court made no finding or estimate of the loss so incurred but merely entered judgment based upon the amount which the reasonable value of the whole work was in excess of the amount which the contractor had received, to wit, the contract price. The U. S. Supreme Court held that the court of claims was in error and reversed the judgment. The opinion states the law, very pertinent to the present case, at 271 U. S. p. 266 (Appendix 3). See also *H. E. Crook Co. v. U. S.,* 270 U. S. 4, 70 L. Ed. 438, 46 Sup. Ct. 183; Ann. 70 L. Ed. 383; Ann. 115 A. L. R. 65.

Counsel for Schaefer flatly took the position that no

evidence of increased costs of performance due to Macris' failures, that is, segregation of costs of performance under the subcontract and the costs occasioned by Macris' failures, would be offered (Tr. 396, 2155-6), and no such proof was in fact made. It should be noted that Schaefer purchased no extra materials for the performance of the subcontract, whether required to be supplied by him or by the Macris (Tr. 394). No extra charge was made for Schaefer's heavy overrun of 14.5% (Ex. 17a; Tr. 1537, 1512). Although all of his complaint with respect to Macris' performance consisted of matters the direct or indirect effect of which would be to cause delay and slow down performance of the subcontract, there was no proof whatsoever as to how many days or hours were added to the performance because of such alleged breaches.

In the case of *Brand Inv. Co. v. U. S.,* 58 Fed. Supp. 749, at 758, the court states:

> "* * * However, when there is delay which constitutes a breach of contract in connection with the performance of which the property or equipment is used, there is an implication of an agreement to pay *only damages actually sustained* and an actual loss must be proved;—compensation is the fundamental principle, but actual loss is the measure of this compensation."

See also *Great Lakes Const. Co. v. U. S.,* 96 Ct. Cl. 378; *C. J. Maney Co. v. U. S.* (1945), 104 Ct. Cl. 594, 62 Fed Supp. 953. Of the many cases considering a

contractor's or subcontractor's right to recover for increased costs resulting from delayed performance, the evidence in the *C. J. Maney Co.* case can well be contrasted with the evidence offered in the instant case to illustrate there was no proof present here as to the damage, if any, sustained by Schaefer as the result of the alleged breaches by Macris.

A distinction should be recognized between this case and cases in which, following a total breach, suit is brought on the contract for damages. Recovery is allowed for the cost of part performance, *U. S. v. Behan,* 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, where the nature of the work unperformed will not permit proof of the cost of completion and application of normal rule of damages in such suits. See *Patterson, Builders Meas. of Recovery for Breach of Contract,* 31 Columbia Law Review 1286. In any event, however, recovery for the cost of part performance is limited to the amount of the contract price. *Restatement of Contracts,* Sec. 333.

The court in the instant case is allowing recovery by Schaefer for overhead based upon 20% of the cost of the job, adopted entirely the wrong method of computing or estimating such an item. Such estimates in themselves have been severely criticised. *E. W. Patterson, Builders Meas. of Recovery for Breach of Con-*

tract, 31 Columbia Law Review 1286, at 1294. The proper method of ascertaining an overhead item to be allocated properly to a given job is by a consideration of the relation between the particular contract and the total amount of all current contracts under performance by the plaintiff. Schaefer, in this instance, the testimony disclosed (Tr. 372), had over 200 jobs under construction to which no consideration whatsoever was given in fixing the proper amount of the overhead of his company attributable to job 1062. *H. P. Foley Co. v. U. S.,* 63 Fed. Supp. 208, at 216; *Sachs v. U. S.,* 63 Fed. Supp. 59, at 71, 104 Ct. Cl. 372; *Brand Inv. Co. v. U. S.,* 58 Fed. Supp. 749.

Moreover, an allowance for any overhead whatsoever was improper in the instant case because the only portion for which recovery could be allowed was that extra overhead cost occasioned by the alleged failures on the part of Macris, causing an increase in the cost of performance. Of this portion of the overhead there was no proof whatsoever, nor even any estimate (Tr. 2214). Similarly, no allowance was proper as an estimated profit item. Schaefer had already been paid the subcontract price and his profit, if any, was included in that. The proper measure of damages to be applied is the increased cost to Schaefer occasioned by the alleged failures on the part of Macris. This is recognized by Schaefer in his complaint in paragraph 2

of the alernative second cause of action. Because of his failure to prove his increased cost of performance, the action should be dismissed, or nominal damages only should be awarded.

4. Schaefer Is Not Entitled to Recover in Excess of the Subcontract Price Because of His Failure to Comply with the Contract Provisions with Respect to Extra Compensation for Delayed Performance.

It is well settled that parties to a contract may stipulate and agree with respect to compensation for alerations and extras in the performance of a construction contract. Ann. 60 A. L. R. 649. Under government construction contracts which by their terms anticipate delay in the performance of the contract due to various causes, the government, and by analogy the principal contractor, does not obligate itself or himself to pay damages to a contractor or subcontractor solely because of delay in making work available for performance. *U. S. v. Howard P. Foley Co.,* 329 U. S. 64, 91 L. Ed. 44, 67 Sup. Ct. 154; *H. E. Crook Co. v. U. S.,* 270 U. S. 4, 70 L. Ed. 438, 46 Sup. Ct. 183; *U. S. v. Rice,* 317 U. S. 61, 87 L. Ed. 53, 63 Sup. Ct. 120.

The provisions of the subcontract requiring notice and statements with respect to extra compensation have been hereinbefore quoted. It is further submitted that Schaefer has not been damaged by reason of breaches, if any, on the part of the Macris

causing delay in performance of the contract and increased costs resulting therefrom because he has failed to comply with the terms of the subcontract, which is binding upon and determinative of the rights of the parties. The case of *Erickson v. Edmonds School Dist.,* 13 Wn. (2) 398, 125 P. (2) 275, so holds in a very analogous case. In the case of *Goss v. Northern Pac. Hosp. Ass'n,* 50 Wash. 236, 96 Pac. 1078, a like result was reached on the basis of a provision very similar to Art. III, Sec. 5 of Schaefer-Macris' subcontract. Compare *Byrne v. Bellingham Cons. School Dist.,* 7 Wn. (2) 20, 108 P. (2) 791. The reason for this rule is well stated in the case of *U. S. v. Blair,* 321 U. S. 730, 88 L. Ed. 1039, 63 Sup. Ct. 820, at 88 L. Ed. pp. 1043-4 (Appendix 4).

5. Schaefer Is Not Entitled to Recover Because of Failure to Minimize His Damages.

As indicated above, the recovery allowed Schaefer is sustainable only on the basis that the same constitutes the increase in his cost of performance of the subcontract resulting from Macris' failures. It has been noted herein that the performance by Schaefer of all the bid items of job 1062 related to his subcontract would have cost him less than 1/7th of the amount of his recovery. By such an expenditure, for which he would have been compensated, he could have completely escaped damage. On the basis of his own

cost estimate (Tr. 2122), he could have done all excavations by hand and still saved $25,000 in his cost of performance. The court found that following complaints by Schaefer, the performance of such items was tendered to him and refused. It is submitted that Schaefer is not entitled to recover because of his failure to mitigate his damages. *Arkley Lumber Co. v. Vincent,* 121 Wash. 512, 209 Pac. 690; *Peninsular Sav. & Loan Ass'n, v. Breier Co.,* 137 Wash. 641, 243 Pac. 830; *Poston v. Western Dairy Products Co.,* 179 Wash. 73, 36 P. (2d) 65; *Hoff v. Lester,* 25 Wn. (2d) 86, 168 P. (2d) 409. Only such damages normally and naturally flowing from breach of a contract as cannot be avoided by reasonable effort are recoverable. *Cannon v. Oregon Moline Plow Co.,* 115 Wash. 273, 197 Pac. 39 (See Appendix 5). Schaefer's wilful withdrawal of his crew from the job site for a period of 71 days manifestly increased any damages he may have sustained. *Williston on Contracts* (Rev. Ed.), Sec. 1353; *Restatement of Contracts,* Sec. 336; *Wilker v. Hoppock,* 6 Wall. 94, at 99, 18 L. Ed. 752; *George A. Fuller Co. v. U. S.* (1946), 105 Ct. Cl. 248, 63 Fed. Supp. 765.

It is interesting to note with respect to the *George A. Fuller Co.* case, last above cited, that where there was a positive delay by the government for a period of three full months, the nature of which entirely pre-

vented the plaintiff from proceeding with the performance of the contract, plaintiff's recovery for delay was limited to $62,000 (only slightly higher than the recovery allowed here by the district court) on a $7,794,000.91 job. The total job price here involved was $139,371.42 and the recovery by Schaefer, sustainable only as his increased cost of performance, constitutes practically 50% of that total job price, of which his subcontract price was less than 1/4th.

6. Schaefer Not Entitled to Recover Because of Failure to File Certificate of Trade Name.

It is submitted that under Rem. Rev. Stat., Sec. 9980, reading as follows:

> "No person or persons carrying on, conducting or transacting business as aforesaid, or having an interest therein, shall hereafter be entitled to maintain any suit in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as provided for in section 9976, and failure to file such certificate shall be *prima facie* evidence of fraud in securing credit."

The district court erred in entering any judgment on behalf of the use plaintiff, Schaefer, no such certilcate as required having been filed prior to trial—or even prior to the closing of Schaefer's case in chief. *McGillivray v. Columbia Salmon Co.,* 104 Wash. 623, 177 Pac. 660; *Sussman v. Mentzer,* 193 Wash. 517, 76 P. (2) 595.

7. There Is No Substantial Evidence to Support the Decision of the District Court That Macris Breached the Subcontract.

It is axiomatic, considering the sweeping deference accorded district courts' findings in a law action by the provisions of USCA Title 28, Sec. 879, Rev. Stat. 1011, that those courts' findings must be supported by substantial evidence.

The following *uncontroverted* and substantial evidence cannot validly be negatived in the present action by any provision of the district court's findings, conclusions or judgment:

(1) The principal contract, numbered 12r-14825 (Ex. 1, with Ex. 3), was completely performed, paid for any accepted (Ex. 61, final estimate). The court so found (Tr. 104; ff. 17).

(2) Specification 1062-1 lists Macris' 28 unit bid items, for each of which a unit price is provided in the schedule (Ex. 3, pp. 3-5). The Schaefer subcontract was for performance of only items 12 and 13—two of such 28 items (Ex. 5, with Ex. 3, p. 4, Items 12 and 13). The only items correlated to such subcontract Items 12 and 13 are Items 7, 8, 9, 10 and 15 (Ex. 3, pp. 3-4).

(3) Complete performance of the principal contract, acceptance and payment thereof would include complete performance of the 28 items bid by Macris.

with the 2 items therefrom subcontracted by Schaefer and with all correlated items as part thereof.

That was the entire value which went into such public work job 1062-1 (Ex. 61, Ex. 14, progress and final estimates). That is conclusively true against Macris, as principal contractors, and through them against Schaefer, as their subcontractor. That is true also regardless of whether or not bids by Macris on the 28 items or by Schaefer for the 2 subcontracted items therefrom were providently or improvidently made.

No more than the quantities represented by such 28 items as finally estimated and as paid at the contract unit prices therefor, respectively (Ex. 61, final estimate), went into such public work job 1062-1.

In connection therewith it is here submitted that, unless there was "labor or material in the prosecution of the work provided in such contract" (as dictated by the very wording of USCA Title 40, Sec. 270b) *and unless there was a "balance thereof unpaid"* (id.), that is, unpaid as provided for by the terms of both the fully performed principal contract and the subcontract, *there is no jurisdiction for this action having been brought in the district trial court under the Miller Act,* USCA Title 40, Secs. 270a, 270b.

The district court in its decision (Tr. 2214-5) definitely stated there was not "any meeting of the

minds'' beween Macri and Schaefer to substitute for the written subcontract (Ex. 5).

The principal contract, the specifications and the subcontract, therefore, remained as the only contractual documents throughout the entire performance and through completion, acceptance and payment for entire performance of the whole of public works job 1062-1 by the terms thereof.

That being true, there cannot legally be any disavowal of the terms of either the principal contract or the subcontract by either Macris or Schaefer.

The legal finality of the agreements themselves, as against controversy between the parties pertaining to compliance with contract terms, is well stated in *Mallory v. Olympia,* 83 Wash. 499, 145 Pac. 627, at page 503:

> ''The words 'the plaintiff wilfully abandoned his work under said contract and wholly failed to complete said contract in accordance with the plans and specifications and to the satisfaction of the city engineer,' considered in the light of the pleadings, make it plain that the issue before the court was whether or not the contract had been completed according to the plan. The contractor said it had. The engineer said it had not. We have no right to say, nor had the court in the former case, under the pleadings, the right to say, that there was a wilful abandonment. There was a dispute as to whether the work had been completed, and nothing more. * * *''

Similarly, because of the existing contract documents and of the full performance of the work thereunder duly accepted, neither Macris as against the government nor Schaefer as against Macris could have validly asserted any claims for extras contrary to the terms of such contract documents.

Macris could not legally have claimed against the government for any extras under the principal contract except in the manner provided thereby and unless such extras were ordered by the government to be performed by Macris (Ex. 3, p. 10, par. 10). Similarly, Schaefer could not have claimed against Macris for any extras under the subcontract, except in the manner provided thereby and unless such extras were ordered by Macris to be performed by Schaefer (Ex. 5, p. 4, Art. 3, sec. 3).

No such order for any extras given by Macris, if it could be construed that at either of the meetings between Schaefer and Macri on April 29 or June 15, 1944, Macri did give any order (which is denied), was complied with by Schaefer (Tr. 2214-5). Schaefer did not furnish any statement for any claimed extras, regardless of whether or not they were ordered by Macris (Tr. 341, 1452, 1471, 2155).

We respectfully urge that there is a lack of substantial evidence to support the district court's judgment amount in the following particulars: (a) excava-

tions for structures; (b) "fine grading"; (c) lumber; (d) unskilled subcontract operations; and (e) reasonableness of amount.

(a) Excavations for structures. The district court found that Macris' excavations for structures were "made approximately one foot out from the base of the concrete structures and with practically vertical banks" (Tr. 100-1); that is, "with only the slope that would naturally result from the excavation by Macri's hoe-type shovel" (Tr. 2210).

The trial court erroneously concluded that the government pay quantity prisms for earth excavation for structures "are very persuasive as to what would be reasonable" clearance to place forms (Tr. 2209). Such specification provisions (Ex. 3, p. 22, par. 47) read as follows:

> "The items of the schedules for excavation for structures include all required excavation for the structures between vertical planes at the upstream and downstream ends of the concrete structures or combinations of adjoining concrete structures: Provided, * * * (covering bridges, turnouts, etc.) * * *, provided further, * * * (covering excavations preceding excavations of lateral or diversion channel prisms) * * *. Except for the limitations described above, excavation for structures will, in general, be measured for payment to lateral dimensions one foot outside of the foundations of the structure and to slopes of 1 to 1 for common excavation and ¼ to 1 for rock excavation: * * *"

The same type of structure and the same type of excavation for it are required for rock excavation as for earth excavation. The error, therefore, of deciding that a bank slope of 1 to 1 is the reasonable requirement for Macris' excavation is apparent.

By way of illustration, we respectfully refer the court to the tabulation of structure headwalls, types and percentages in our foregoing statement of job facts. There is shown thereby 74% or 262 structures with a headwall of less than 4½′ and with not over 3½′ below ground surface. The government pay quantity prism for excavation for structures would be for a rock cut 1′ out at the base, plus ¼′ per foot of cut depth or ¼ of 42″ or 13″, to make a total of 2′ 1″ or 25″ clearance at the top of the rock cut, and would dictate for an earth cut one foot out at the base plus 1x3½′ cut depth or 4½′ clearance at the top of the earth cut. Taking next a case of a structure with an extreme depth (that shown by the model, Ex. 25, which was "one of the deepest structures"—Tr. 1810) and calling the depth below ground 6′ (Tr. 2036), the distance out at the top of the bank on a ¼ to 1 slope would be 1′ out at the base plus ¼ of 6′ depth, or 2½′, to equal a total of 3½′ out at the top. While if the court's idea of reasonableness were applied it would be 1′ out at the base plus 1x6′ depth, or 7′ out at the ground surface—a distance so far away from the form

as to be impracticable to get within working distance for placing the concrete in the forms. *Yet the same clearance is needed between the formwall and bank wall, whether the cut be rock or common excavation.*

The practical space between the formwall and the excavation wall is only that required to unfasten the form holders. Anderson, a man with years of experience on the Roza Project, explains the whole practicality of operating and required clearance at Tr. 1788-9. The reading thereof is respectfully commended to this court. Similarly, we respectfully call the court's attention to the testimony of Macris' first superintendent, Staples, that the hoe operation would cut "one width of the bucket" or 26" outside the stakes as set for excavation of a structure (Tr. 1732, 1753), and his further testimony that except on the first lateral none of the structures had vertical walls (Tr. 1754). Supporting Staples, Macris' superintendent Ashley also stated that the stakes were off-set from the place originally staked 1' out so that while standing after the excavation they were at a considerable distance from where they had been originally set (Tr. 1876-7). The district court missed this significant fact in pointing to Ashley's explanation of staking for a structure (Tr. 2210).

Significantly, too, Schaefer admitted his forms were not made perfect "by a long shot" (Tr. 1363), and

Lyons, his foreman, stated they made the hole fit whatever form panels were sent to them on the job, didn't check same (Tr. 1089). Also, Schaefer's "expert witness" Bufton stated that "excavations should be one foot out at the base" (Tr. 1152) and the court found they were substantially that (Tr. 100-1). Bufton also minimized Schaefer's complaints about carpenters digging by his statement "I certainly would have a shovel on the job while setting forms" (Tr. 1218). This significant and substantial evidence was also passed by the district court.

(b) Fine grading. The district court found that Macris "failed to do the fine grading *in accordance with the layout plans and specifications.*" (Tr. 101; ff. 12). (Italics ours.) Substantial evidence is to the contrary.

The layout plans (Ex. 12) do not specify anything about "fine grading." The specifications at Ex. 3, p. 23, par. 47, refer only to "finished by hand." Where the concrete itself rests on the ground instead of against a form the provision reads, p. 23:

> "* * * The contractor shall prepare the foundations at structure sites in a manner suitable for forming foundations for the concrete structures. The bottom and side slopes of common excavation *upon or against which concrete is to be placed* shall be finished accurately by hand to the dimensions shown on the drawings or prescribed by the contracting officer, and the surfaces so prepared

> shall be moistened with water and tamped with suitable tools for the purpose of thoroughly compacting them and forming firm foundations *upon which to place the concrete structures.* * * *'' (Italics ours.)

While Macri did a great deal of bank dressing—in fact had a crew doing it—it was an operation "for which specific unit prices are not provided in the schedules." It was a labor item which Schaefer insisted was necessary and on the necessity of which he largely rested his claimed damages for delays. It was done by Macris and to the full extent done by them was not charged to Schaefer.

Like the gratuitous furnishing to Schaefer by Macris of a job office, constructed panel forms and 8 or 10 kegs of nails, it too was furnished to cooperate in getting timely Schaefer subcontract performance. The voluntary furnishing thereof did not make it a Macri legal obligation.

(c) Lumber. The district court also found that Macris failed to furnish lumber "in sufficient quantity and not furnished in quality which was the minmum requirement for work of this kind" (Tr. 101-2; ff. 13). Substantial evidence is to the contrary.

There is not any bid item, or pay quantity, in the specifications (Ex. 3, pp. 3-5) for either "fine grading" or lumber. Also, the Schaefer subcontract (Ex. 5) does not *specify* either fine grading or lumber as a

Schaefer item or as a Macri item.

The subcontract does provide that Schaefer will "furnish all labor and necessary equipment to do all the concrete work, formwork, cut, bend and install all reinforcing steel, all such work as shown in the plans and as specified in Specifications 1062, Contract No. 12r-14825, Roza Division, Yakima Project, Washington" (Ex. 5, pp. 1-2).

Specifications 1062 (Ex. 3, p. 22, par. 46) provides, for the pertinent part here, under the heading of construction of structures as follows:

> "* * * All structures shall be built in a workmanlike manner and to the lines, grades, and dimensions shown on the drawings or prescribed by the contracting officer. The contractor shall place and attach to each structure all timber, metal, or other accessories necessary for its completion, as shown on the drawings or as directed by the contracting officer. The cost of such work, *for which specific unit prices are not provided in the schedules,* shall be included in the unit prices bid in the schedules for the work to which it is appurtenant. * * *" (Italics ours.)

Lumber is part of the form work and is recognized by the government as "an expendable item" (Tr. 1532) of the concrete work.

It is true that Schaefer cut his bid from $30.00 to $26.00 per cubic yard for concrete placed, with Macris to furnish the lumber (Tr. 1441, 419), because Schaefer felt Macri was in a better position to get it. (Tr.

390). While, strictly speaking, under the contract terms lumber was not a Macri subcontract item within the legal definition of "materials," Macris did furnish approximately 120,000 board feet of lumber plus plywood (Tr. 1471). Anderson estimated the total lumber required for job 1062 was 70,000 board feet and he gave his reasons from experience (Tr. 1796). Hance, a former Bureau engineer, estimated required lumber at 60,000 board feet (Tr. 1892). No total quantity was given by any Schaefer witnesses. Schaefer himself admitted that the quantity might have exceeded 150,000 board feet (Tr. 418).

There was a known national lumber shortage when Schaefer and Macris signed the subcontract. It continued throughout the operations, requiring priorities to get any lumber. The government recognized it and relaxed its requirements (Tr. 1528-9). Schaefer and his witnesses acknowledged it (Tr. 389, 1124, 1179, 1210). Two experienced reclamation project operators confirmed it (Tr. 1778, 2052; Ashley also, Tr. 1853). *No witness denied national lumber shortage.* Therefore, Schaefer and Macris contracted with that shortage as a continuing factor, which the district court did not consider.

Schaefer himself testified that the type of lumber he had selected in the seven boards shown as Ex. 29 came

from not to exceed two loads (Tr. 337) and from a total of not to exceed 5,000 feet (Tr. 418). He gave Macris no notice about it (Tr. 341). Anderson, who was familiar with the lumber, testified that it was adequate form lumber (Tr. 1797). Klugg, who had been on the job from the start to the finish and had worked on other Roza projects, testified that "the job had lumber coming there right along" (Tr. 2053). Nelson confirmed this (Tr. 1541).

These factors of acuteness in lumber, coupled with Macri's detail of his arrangement of ordering and endeavoring to secure unlimited supplies of lumber (Tr. 1591, 1592, 1594, 1595, 1597, 1624), furnish the only substantial evidence pertaining to lumber supplies.

(d) Unskilled subcontract operations. Only one one example thereof need be given here. That is substantial evidence of Schaefer's unskilful job performance, which the district court wholly disregarded. Ex. 17a, the concrete engineer's report, shows Schaefer overran the job in use of concrete by 14.5%. Nelson, the government engineer in charge, stated that Ex. 17a indicates a factual determination through his office (Tr. 1512). He further stated that the substantial portion of 14.5% overrun of concrete would be represented by the amount that the forms were in *excess of the de-*

signed amount or that the subgrade could have been below grade. He further stated, on cross-examination, that he doubted that the subgrade was below grade because inspectors required compaction back to grade (Tr. 1537-8). He declined to state that over-excavation had occurred (Tr. 1539).

Hance, who inspected forms in the field at time of trial, found concrete walls varying from 4¾″ to 5⅜″ and found most of the inspected structures from ¼″ narrow to ⅜″ wide (Tr. 1924). This shows unskilful setting of forms to account for the 14.5% of concrete overrun, and Schaefer's elaborate claims of insufficient excavations.

Schaefer's expert, Bufton, stated (Tr. 1205) that anything over 2% of overrun of concrete would be excessive. At Tr. 1207 he raised it to 5% and concurred that it would indicate unskilful operation.

(e) Unreasonableness of judgment amount. The judgment of $56,764.97—not counting in addition the $32,614.66 paid Schaefer—is over 7½ times the full pay items of $7,694.13 by the government for the 4 items, Nos. 7, 8, 9 and 10, correlated to the Schaefer subcontracted items 12 and 13. That means that if Schaefer had done all the correlated work items—and in fact he did not do them—the court amount would dictate that he be paid not the total contract price of $7,694.13, but 7½ times that amount. This is top heavy

and unreasonable.

Similarly, considering that all structure excavations could have been made entirely by hand and so dressed for $1.50 per cubic yard (figuring 1½ hours to dig a cubic yard) x 7512.5 cubic yards of common excavation for structures in the final estimate (Ex. 61), or $11,-268.75, plus 246.6 cubic yards of rock excavations for structures (Ex. 61) x $3.00 per cubic yard, or $739.20, to total $12,007.95 (Tr. 1901-2), the court's figure of $56,764.95 is still $44,757.02 grossly unreasonable, *if Schaefer had done that work,* which he did not. Or, even indulging in Schaefer's own estimate that it would take a man 3½ hours and would cost $3.50 to dig a cubic yard of earth (Tr. 2122-2154) to total $21,178.15, the court's figure is still $25,596.82 grossly unreasonable.

We respectfully submit that a total to Schaefer of $89,379.63 ($56,794.97 judgment amount plus $32,-614.66 paid) from the total gross earnings of $139,-371.42 (Ex. 61) for the whole of job 1062-1, leaving only $49,991.79 for the construction of 10½ miles of laterals and sublaterals and all other improvements in the whole job area, is so far out of line that there cannot be and there is not any substantial evidence to support it. *George A. Fuller Co. v. U. S.* (1946), 104 Ct. Cl. 248, 63 Fed. Supp. 765.

Further, with respect to the amount allowed Schae-

fer, the only evidence offered to support such a figure is Ex. 63, which purports to be a compilation from Schaefer's original books of account. The books themselves when offered in evidence were excluded. This was error. 20 *Am. Jur., Evidence,* 1051. Nor was there any attempt to segregate the costs (Tr. 1298-9). The witness who prepared the compilation did not keep the books. Schaefer's bookkeeper did not testify (Tr. 1265). Continuing objections pointing out the deficiences of Ex. 63, overruled by the court, are evidenced in the record (Tr. 1245, 1251, 1252, 1259, 1265, 1266, 1267, 1275).

THE APPELLANT CONTINENTAL CASUALTY COMPANY IS NOT ENTITLED TO AN AWARD OF ADDITIONAL ATTORNEYS' FEES BY THIS COURT.

The cases cited by appellant, Continental Casualty Company, in support of its contention that it is entitled to recover an additional sum for attorneys' fees for services on its appeal, are cases in which the court was construing a federal statute which extended the right to recover attorneys' fees. In the instant case, that appellant's claim for attorneys' fees is contractual. The law of the State of Washington is determinative. Under the cases of *Flint v. Bronson,* 197 Wash. 686, 86 P(2) 218, and *Lavanway v. Cannon,* 37 Wash. 593, 79 Pac. 1117, additional fees on appeal

are not recoverable unless fixed by the trial court. This holding is in accord with the general rule that an appellate court will consider only such questions as are raised below. *Am. Jur., Appeal and Error,* sec. 281.

CONCLUSION

In conclusion, it is respectfully submitted that the judgment of the district court in favor of the use plaintiff M. C. Schaefer is opposed to the law applicable to this case, and is not supported by any substantial evidence. The judgment should be reversed and the action dismissed.

Respectfully submitted,

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I

APPENDIX

1. 12 *Am. Jur., Contracts,* Sec. 390, states as follows:

"Waiver of Total Breach; Election to Continue Performance.—The right to refuse to perform further or to accept further performance and to maintain immediately an action for damages because of a material or total breach may be waived, and the injured party may accept or insist on performance after such breach of the contract. Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, not indeed depriving him of a right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on his own part. *And under ordinary circumstances, where there is an existing actual breach of contract, of a character going to the essence, the innocent party will, if he insists on performance notwithstanding the breach, keep alive his own obligation to continue with performance, with the result that the party at fault, even though having in the interval done nothing in reliance on a continuance of performance, may, if he sees fit, turn about and hold the innocent party to performance.*" (Italicized portion added to section by pocket supplement.)

2. *Ingle v. Jones,* 2 Wall. (69 U. S.) 1, 17 L. Ed. 762, at 764:

"While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue on the contract, or *indebitatus assump-*

sit, and rely upon the common counts. In either case the contract will determine the rights of the parties.

"When he has been guilty of fraud, or has willfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit.*

"He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the cost of the work or materials has been increased, in so far the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance.

"There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications. *Cutler v. Powell,* 2 Sm. L. Cas., 1."

3. *United States v. Wyckoff Pipe & C. Co.,* 271 U. S. 263, 46 Sup. Ct. 503, 504, 70 L. Ed. 938, at 271 U. S. page 266:

"The government contends that recovery cannot be had on the contract for the higher market value of the work at the time it was actually performed; that the correct measure of damages for its delay is the loss actually sustained by the contractor as the result of the delay (United States v. Smith, 94 U. S. 214, 24 L. ed. 115; United States v. Mueller, 113 U. S. 153, 28 L. ed. 946, 5

Sup. Ct. Rep. 380; Ripley v. United States, 223 U. S. 695, 56 L. ed. 614, 32 Sup. Ct. Rep. 352); that the increase in the market value of materials purchased for use on the contract cannot be deemed a loss; and that to assess damages on the basis of the value of the work at the time it was performed was, in effect, to make a new contract for the parties or to allow recovery as upon *quantum meruit*. The contention is, in our opinion, well founded.

"The contractor urges that the long delay was a breach which would have justified it in terminating the contract and refusing to do the work except under a new one at an increased price. But, despite a contention to the contrary, it did not do this. It completed the work under the contract as originally made. It did not attempt to make a new contract, or to modify the existing one. It sought merely to reserve its right to make a claim for the damages resulting from the government's delay. After completing performance it brought this suit declaring on the original contract.

"The contractor urges also that, because of the delay, it might have used the supplies purchased on another job, receiving on that their then market value, or might have sold them and taken the incidental profit due to the rise in values; and that, if it had done either and had been obliged later to purchase new supplies at the higher market values in order to perform the government job, the increased cost would have been recoverable as a loss; and that, as the amount of this increase has been found, the recovery should be sustained at least to that extent. The contractor's contentions, however, ignore the rule that damages for delay are limited to the actual losses incurred. The contractor elected to hold itself in readiness to perform its contract and to this end to retain

both the lumber and the creosote oil. The carrying charges thus incurred are an allowable item of damage; but these were not shown. It may even be that in the event of a use or resale of the supplies, if under the circumstances such a course of action was open to the contractor, the profits made would have been available in reduction of damages. Compare Erie County Natural Gas & Fuel Co. v. Carroll (1911) A. C. 105—P. C. But clearly it cannot now charge as a loss profits which it might have made if it had sold the supplies in the market or used them on another job. "It is argued that the court of claims is under no obligation when assessing damages to specify the elements of the calculation by which it arrives at its results; that itemization is often impossible; and that, like a jury, the court may make an estimate and return such sum as the damages recoverable (compare United States v. Smith, 94 U. S. 214, 219, 24 L. ed. 115, 116), and that, accepting the rule that damages are to be limited to actual loss, the award of the lower court is to be regarded as an estimate of such loss. But, in the case at bar, the court did not pursue that course. It made no estimate of the loss suffered. It found merely the increase in value of the work at the time it was performed and the increase in value of the material during the period of the delay. Then it found and concluded, as a matter of law, that the excess of the reasonable value of the work at the time it was done over the amount paid therefor, was recoverable as damages. This was error."

4. *U. S. v. Blair,* 321 U. S. 730, 88 L. Ed. 1039, 63 Sup. Ct. 820, at 88 L. Ed. pp. 1043-4:

"Respondent has thus chosen not to follow 'the only avenue for relief,' United States v. Callahan Walker Constr. Co., 317 U. S. 56, 61, 87 L. ed. 49,

53, 63 S. Ct. 113, available for the settlement of disputes concerning questions arising under this contract. In Article 15 the parties clearly set forth an administrative procedure for respondent to follow. Such a procedure provided a complete and reasonable means of correcting the abuses alleged to exist in this case. Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactorily by their superiors. Furthermore, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims."

5. *Cannon v. Oregon Moline Plow Co.,* 115 Wash. 273, 197 Pac. 39, at page 281:

"In this case the power necesary to plow appellant's land for seeding the crop could not be limited to the tractor purchased by him from the plow company. He had refused to strain his credit by procuring the discount of the notes and paying the cash to the plow company as it desired, and the plow company thereupon, wrongfully it is true, cancelled the contract and retook the tractor; but there were other tractors in Spokane—a large and populous commercial and industrial center—and if it was necessary to have a tractor immediately, appellant does not deny that he could have, as he says, strained his credit and bought what he needed, but he did not feel inclined to do so.

"It will not do to adjudge that one can hold a particular person exclusively liable for all the re-

sults that may flow from a tort or breach of contract which were reasonably preventable; for, if such damages are allowed, which can be avoided or prevented, in whole or in part, by the exercise of ordinary diligence on the part of the injured party, the results to business will be disastrous. The enormous damages that might ensue from the breach of the smallest contract, or from the slightest tort, may be so augmented that no one would be safe in doing any kind of business. Upon this ground alone, in this particular case, without further considering any of the other important questions discussed by counsel, we are satisfied that appellant is not entitled to recover the damages claimed by him."